

The Order of August 24, 2001

The August 24, 2001 Order recounts the history of this docket, including the filing of AT&T's discovery requests to both the TEC Companies and the Consumer Advocate Division of the Office of Attorney General ("Consumer Advocate") on March 23, 2000. The parties to this action were served on February 24, 2000 with a Notice setting an initial Pre-Hearing Conference in this docket for March 17, 2000. On March 7, 2000, the Consumer Advocate filed a *Motion for Summary Judgment Dismissing AT&T's Complaint Against TEC's Proposed Rate Design because AT&T's Proposed Design is not in the Public Interest or, in the Alternative, for Transfer to the Access Charge Reform Docket* ("Motion for Summary Judgment"). On March 14, 2000, the Pre-Hearing Conference set for March 17, 2000 was postponed. On March 23, 2000, AT&T filed its Reply to the Motion for Summary and, at the same time, served the TEC Companies and the Consumer Advocate with discovery requests.

On April 12, 2000, the Pre-Hearing Officer received a letter from counsel for the TEC Companies stating the following:

I spoke to Val Sanford before the Directors' Conference yesterday and asked if his client, AT&T would be willing to postpone my client's obligation to respond to these discovery requests until a procedural schedule has been set requiring such responses. Val expressed a willingness to do so as long as the pre-hearing conference to establish such a schedule is not set too far into the future.¹

Counsel for AT&T confirmed this agreement in his own letter received by the Pre-Hearing Officer on April 14, 2000.²

On April 19, 2000, the Authority issued a Notice rescheduling the Pre-Hearing Conference for April 28, 2000. After several requests for continuance were granted, the Pre-

¹ Letter from R. Dale Grimes, Esq. (April 12, 2000).

Hearing Conference was re-scheduled for June 9, 2000, pursuant to a Notice issued on May 30, 2000.

The Order of August 24, 2001 sets forth in detail the events that transpired at the June 9, 2000 Pre-Hearing Conference and the December 14, 2000 Status Conference. At both of those Conferences, the TEC Companies and the Consumer Advocate presented arguments that AT&T should be dismissed from this docket.³ Prior to a determination of the *Motion for Summary Judgment*, the Pre-Hearing Officer was advised that AT&T and the TEC Companies were negotiating a settlement. A Pre-Hearing Conference was held on May 8, 2001, at which time AT&T and the TEC Companies presented their Memorandum of Understanding. Through the Memorandum of Understanding, AT&T and the TEC Companies sought to amend the Settlement Agreement under consideration in this docket by re-allocating certain overearnings and amending the proposed rate design. The Memorandum of Understanding was opposed by the Consumer Advocate.

The Order of August 24, 2001 set forth the following resolution of matters under consideration:

...the Pre-Hearing Officer finds that this docket can be resolved most efficiently and expeditiously by: (1) denying the Motion for Summary Judgment and the Memorandum of Understanding, and (2) as to the Joint Petition, proceeding on the issues of (a) whether the amount of overearnings identified in the Settlement Agreement for the TEC Companies for the years 1999-2001 is correct; and, if so, (b) how and to what extent the rate design described in the Settlement Agreement should be amended to adjust for the overearnings identified therein.⁴

The Order of August 24, 2001 established a procedural schedule for the filing of pre-filed testimony which required that direct testimony be filed by September 7, 2001 and rebuttal

² See, Letter from Val Sanford, Esq. (April 13, 2000).

³ Pre-Hearing Officer's *Order* (August 24, 2001), pp. 4-6.

testimony be filed by September 14, 2001. The Order of August 24, 2001 did not provide for discovery within the procedural schedule for filing pre-filed testimony.

AT&T's Petition for Reconsideration

AT&T filed its *Petition* on September 6, 2001 seeking reconsideration of the Pre-Hearing Officer's August 24, 2001 Order. As the basis for the Petition, AT&T asserts that "the Pre-Hearing Officer overlooked the outstanding discovery request of AT&T."⁵ The only "reconsideration" requested by AT&T in the *Petition* is that the Pre-Hearing Officer should order the TEC Companies to respond to AT&T's March 23, 2000 discovery requests. AT&T states that if the TEC Companies do not have sufficient time to respond to the discovery before the date for filing pre-filed direct testimony, then the procedural schedule should be revised to allow the TEC Companies "a reasonable amount of time to prepare their answers" and AT&T sufficient time "to analyze the responses and to incorporate that analysis into its written testimony."⁶

On September 17, 2001, the TEC Companies filed *Response of Crockett Telephone Company, Inc., Peoples' Telephone Company, and West Tennessee Telephone Company, Inc. in Opposition to AT&T's Petition for Reconsideration* ("TEC Companies' Response"). The TEC Companies' Response focuses on AT&T's request for discovery and presents four reasons why that request should be denied. In the first instance, the TEC Companies argue that AT&T has already filed the testimony of witness Richard T. Guepe which covers some of the issues addressed in the discovery, thereby rendering the discovery request unnecessary to the disposition this case. Next, the TEC Companies assert that the part of the information

⁴ Pre-Hearing Officer's Order (August 24, 2001), p. 8.

⁵ AT&T's *Petition for Reconsideration* (September 6, 2001), p. 2.

⁶ *Id.*, p. 4.

sought by AT&T through discovery is available to AT&T as public records. Thirdly, according to the TEC Companies, there are certain interrogatories from AT&T for which information is not available and therefore cannot be answered. Finally, the TEC Companies argue that certain information requested by AT&T will not lead to any evidence which will support AT&T's position, in essence as assertion that those requests seek information irrelevant to this action.

On September 21, 2001, the Consumer Advocate filed *Attorney General's Objection to AT&T's Motion to Reconsider and Comments Concerning the Need for a Hearing* ("Consumer Advocate's Objection"). The Consumer Advocate's Objection reiterates the argument that AT&T is seeking, in this docket, access charge reform and is thereby raising issues "more appropriately considered in other dockets open before the Authority and the FCC."⁷ The Consumer Advocate argues that AT&T's Petition should be denied to avoid additional delay.

Findings and Conclusions

The Pre-Hearing Officer finds that even though AT&T's Petition was timely filed within the Tenn. Code Ann. § 4-5-317 and Authority Rule 1220-1-2-.20, the relief sought by AT&T does not fall within the purpose of a petition for reconsideration as contemplated by that statute and rule. AT&T's Petition is basically a request that it be permitted to conduct discovery as to the TEC Companies and that such be included in the procedural schedule established in the August 24, 2001 Order. The procedural schedule for the filing of pre-filed testimony established in the Order of August 24, 2001 did not provide for discovery between

⁷ *Attorney General's Objection to AT&T's Motion to Reconsider and Comments Concerning the Need for a Hearing* (September 21, 2001), pp. 3-4.

the parties. The Pre-Hearing Officer did not make a determination in that Order on whether discovery would be permitted.

It is clear from the filings and the record of the Pre-Hearing and Status conferences in this case that from the outset, the TEC Companies and the Consumer Advocate have disputed AT&T's very presence in this docket. It is also clear that the TEC Companies and Consumer Advocate contested nature and the timing of the discovery served on them by AT&T before a discovery or procedural schedule was established and before a pre-hearing conference was held. Nevertheless, before the issue of AT&T's appearance was the resolved and a procedural schedule was established, the Pre-Hearing Officer was informed that AT&T and the TEC Companies had reached a settlement of the issues between them. The Memorandum of Understanding filed by AT&T and the TEC Companies on May 8, 2001, reflected that those parties had entered into extensive negotiations.

AT&T's Request for Discovery

The Authority Rules 1220-1-2-.11(1) through (3) pertaining to discovery procedure provide as follows:

- (1) Any party to a contested case may petition for discovery. In any case where discovery is sought, no discovery shall be undertaken until a discovery schedule is set in accordance with these rules. Parties are encouraged where practicable to attempt to achieve any necessary discovery informally, in order to avoid undue expense and delay in the resolution of the matter at hand. When such attempts have failed or where the complexity of the case is such that informal discovery is not practicable, discovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure.
- (2) Any party may at any time prior to the hearing of a case on its merits move for the setting of a discovery schedule, either in a pre-hearing conference or by order of the Authority or a Hearing Officer. Any such motion may be denied if it appears the movant has unreasonably delayed disposition of the case on its merits.

- (3) Each petition for discovery shall state with reasonable specificity the issues to which discovery may be directed and the manner in which discovery is proposed to be accomplished

Pursuant to the above stated rules, any party may request discovery prior to a hearing on the merits of the case, however, no discovery shall be conducted until such time as a discovery schedule has been established.

The Order establishing the filing of pre-filed testimony was entered on August 24, 2001. September 7, 2001 was established as the date for the initial filing of pre-filed testimony. AT&T's *Petition* was filed on September 6, 2001. AT&T's *Petition* was not filed sufficiently before the established date for the filing of pre-filed direct testimony to allow for the specific relief sought in the *Petition*.

The parties have complied fully with the schedule for filing direct and rebuttal testimony. AT&T has asserted that, as to Issue No. 1,⁸ discovery would have assisted it in the preparation of its pre-filed testimony. The Pre-Hearing Officer finds merit in certain assertions of the TEC Companies and the Consumer Advocate that AT&T's discovery requests may have been rendered moot by the filing of pre-filed testimony or may not be relevant to the subject matter of this case. Nevertheless, to the extent that AT&T is need of information which it did not obtain in the course of working with the TEC Companies in arriving at the Memorandum of Understanding, the Pre-Hearing Officer is inclined to permit limited discovery by AT&T in short order. For this reason, the Pre-Hearing Officer will permit limited discovery, the scope of which will be determined by the Pre-Hearing Officer during a Pre-Hearing Conference to be held on **Thursday, October 4, 2001, at 11:00 a.m.** in

⁸ The August 24, 2001 Order established Issue No. 1 as follows: Whether the amount of over earnings identified in the Settlement Agreement for the TEC Companies for the years 1999-2001 is correct. At pp. 16 and 17.

the Hearing Room of the Tennessee Regulatory Authority.⁹ The parties shall be prepared to discuss the need for and limitations on specific discovery. AT&T must demonstrate that specific discovery requests are necessary for the preparation of its case. The TEC Companies shall be prepared to demonstrate with specificity the bases for their assertions that certain discovery requests are either not relevant to the issues in this case, are overly burdensome or have already been answered through the filing of pre-filed testimony.

The Parties Comments on Whether a Hearing with Live Testimony is Required.

The August 24, 2001 Order requested that the parties file comments as to whether a hearing with live testimony is required in this matter. AT&T filed its comments on September 18, 2001, stating that it is unable to determine, in the absence of discovery, whether there is a need for a hearing with live testimony. The TEC Companies and the Consumer Advocate filed their comments on September 21, 2001. Both of these parties assert that the Authority can render a decision on the Petition, based upon the pre-filed testimony as submitted. The Consumer Advocate suggests that briefs could be submitted in addition to the pre-filed testimony, should the Authority so determine. This matter will be discussed during the Pre-Hearing Conference to be held on October 4, 2001.

IT IS THEREFORE ORDERED THAT:

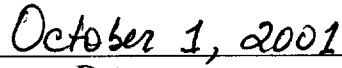
1. AT&T's Petition for Reconsideration is denied.
2. AT&T's request for discovery as to the TEC Companies is granted. The scope of such discovery shall be determined by the Pre-Hearing Officer after hearing oral argument from the parties.

⁹ The Pre-Hearing Officer notified the parties on September 28, 2001 of the scheduling of this Pre-Hearing Conference.

3. A Pre-Hearing Conference is hereby set for **Thursday, October 4, 2001** at **11:00 a.m.** in the Hearing Room of the Tennessee Regulatory Authority. The parties shall present their respective arguments as to the specific discovery requests of AT&T and as to whether a hearing with live testimony should be held in this matter.



K. David Waddell, Executive Secretary


J. Richard Collier, Pre-Hearing Officer

Date